

Before the  
SURFACE TRANSPORTATION BOARD  
Washington, D.C. 20423

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C. L. CONSULTING AND MANAGEMENT )  
CORP.—PETITION FOR DECLARATORY )  
ORDER—REASONABLENESS OF ) DOCKET NO. FD 36042  
DEMURRAGE CHARGES )

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PETITIONER'S RESPONSE TO REPLY  
TO PETITION FOR DECLARATORY ORDER

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C. L. Consulting and Management Corp. (CLC), by and through counsel of record, hereby submits its Response to Norfolk Southern Railway Company's (NSR) Reply to Petition for Declaratory Order. CLC files this Response in order to address the argument that the Board should decline to address CLC's petition because the federal district court before which this dispute has been pending "was specifically asked by CLC to refer this dispute to the Board, and the court declined to do so."<sup>1</sup> The primary issue that CLC has presented to the Board in its petition has never been considered by the magistrate judge who has handled the initial stages of the District Court case. Furthermore, even if the magistrate judge had declined to recognize the Board's primary jurisdiction over the issue that CLC has asked the Board to resolve, that would not prevent the Board from issuing a declaratory order regarding the novel issue involved in this proceeding.

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<sup>1</sup> NSR Reply at 1.

**I. There is nothing to prevent the Board from exercising its primary jurisdiction in this matter.**

The facts in this proceeding are readily distinguishable from those in *Nat'l Solid Wastes Mgmt. Ass'n., et al.—Petition for Declaratory Order*, STB Docket No. FD 34776 (served March 8, 2006)(*Wastes Management*). As the Board therein recognized, there was “no active case or controversy for the Board to resolve.”<sup>2</sup>

Furthermore, as was the situation in *Green Mountain Railroad Corporation-Petition for Declaratory Order*, STB Finance Docket No. 34052, slip op. at 3-4 (served May 28, 2002)(*Green Mountain*), “[t]he Board and the courts already have developed a considerable body of law addressing the reach of federal preemption under section 10501(b), in cases involving facilities, which the district court can apply in this case.” Indeed, the *Green Mountain* decision, which was issued by the Director, Office of Proceedings and reflects multiple Board and appellate court precedents confirming federal preemption of the narrow issue involved in that proceeding, confirmed the lack of any need for the Board to exercise primary jurisdiction in that proceeding.

Because the issue involved in this proceeding is based on unique facts and is unlikely to reappear before the Board, the fact that the magistrate judge has declined to refer other issues involving alleged unreasonable practices to the Board does not bar the Board from exercising its primary jurisdiction in the absence of a referral. As the Third Circuit has previously recognized in a case

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<sup>2</sup> *Id.* at 4.

involving liability for demurrage charges, “[p]rimary jurisdiction ‘is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.’ *W. Pac. R.R. Co.*, 352 U.S. [59], 63 [(1956)].”<sup>3</sup> Moreover, it “is intended to ‘serve[] as a means of coordinating administrative and judicial machinery’ and to ‘promote uniformity and take advantage of agencies’ special expertise.’” *Pejepscot Indus. Park, Inc. v. Maine Cent. R.R. Co.*, 215 F.3d 195, 205 (1st Cir. 2000) (internal citation omitted). In *Novolog*, because CSXT failed to invoke the doctrine of primary jurisdiction until after the District Court had already decided the issue and because the Board’s “expertise would not have been crucial to the determination of the issues here, which involve the analysis of precedent and statutory interpretation,” the District Court did not abuse its discretion in denying CSXT’s motion for conditional referral to the STB.<sup>4</sup>

In this proceeding, because an issue of first impression is involved, the Board is not being asked to analyze precedent. CLC’s petition raises the unique issue of whether a material, after being offered in transportation as an “elevated temperature material,” which caused it to be recognized at origin as a “hazardous material,” is subject to an additional storage charge as a “hazardous material,” when, before being placed in storage, it had cooled to a temperature that had removed it from PHMSA’s definition of an “elevated

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<sup>3</sup> *CSX Transportation Co. v. Novolog Bucks County*, 502 F.3d 247, 253 (3rd Cir. 2007, as amended September 14, 2007).

<sup>4</sup> *Id.* 502 F.3d at 254.

temperature material.” In its petition, CLC seeks the Board’s determination that it is an unreasonable practice for NSR, after assessing a standard storage charge of \$60 per car, to assess an additional \$100 storage charge based on NSR’s claim, which finds no support in PHMSA’s definition of a hazardous material, that the material continues to be a “hazardous material” after it has cooled to a temperature below 212° F. At no point has CLC or any other party in the District Court case ever requested the court to refer this specific issue to the Board pursuant to the primary jurisdiction doctrine. Therefore, NSR’s claim that the the case would preclude the Board from issuing a declaratory order that would resolve the primary issue raised by CLC is baseless.<sup>5</sup>

**II. NSR’s positions are undermined by the facts and by governing regulations pertaining to the transportation of hazardous materials.**

In its Reply, NSR has not contested the findings in the GATX study that correlates time in transit with the drop in temperature of asphalt between ambient temperatures ranging between 25° F and 95° F. Nor has it sought to address the Report submitted by Clement Mesavage, which explains the various PHMSA definitions and regulations applicable to asphalt and shows that asphalt, at temperatures below 212° F, is not deemed to be a hazardous material.

Instead, NSR claims, without any support, that because asphalt was originally offered in transportation as an elevated temperature material, “it remains a hazardous shipment throughout its journey. See 49 CFR §

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<sup>5</sup> NSR Reply at 11-12.

171.1(c).”<sup>6</sup> That assertion must be viewed in the context of other provisions that effectively recognize the transition of elevated temperature asphalt to an unregulated non-hazardous material status. In addition, NSR’s position ignores the fact that in each instance, transportation was suspended when the tank cars were constructively placed and stored in NSR’s Oak Island yard.

The key distinction between asphalt and the materials listed in in PHMSA’s Hazardous Materials Table at 49 CFR § 172.101 is that the status of those other materials does not change at any time. Once other materials are classified as a hazardous material and listed at § 172.101, they are always a hazardous material. As a result, the tank cars used to transport them must be placarded at all times until the cars are unloaded.

In stark contrast, the general rules applicable to the placarding of railcars used to transport hazardous materials do *not* apply to tank cars that are used in the transportation of asphalt. As CLC has explained, 49 C.F.R. § 172.325 requires that “a bulk packaging which contains an elevated temperature material must be marked on two opposing sides with the word ‘HOT’ in black or white Gothic lettering on a contrasting background.” That requirement is satisfied in two ways. The marking may be displayed on the packaging (the tank car) itself **or** the marking may be displayed “in black-lettering on a plain white square-on-point configuration having the same outside dimensions as a placard.” When tank cars are placed in dedicated

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<sup>6</sup> *Id.* at 13.

service for the transportation of asphalt, regardless of whether the tank car is loaded or empty, they generally exhibit the “HOT 3257” U.N. Identification Number.

In addition, PHMSA provides an explicit exception to the requirements imposed by 49 C.F.R. § 172.502(a) that broadly prohibit the placing of placards on cars that do not contain a hazardous material. The exception, provided by 49 C.F.R. § 172.502(b)(2), states that “[t]he restrictions of paragraph (a) of this section do not apply to the display of ... a ‘HOT’ marking, or an identification number on a white square-on-point configuration in accordance with ... § 172.325(c).” Therefore, there is no requirement that anyone, including NSR or another railroad, remove either the permanent markings from the tank cars or the placard-like stencils reflecting UN No. “HOT 3257” when the temperature of the asphalt cools during transit to less than 212° F. Given the fact that the so-called “placards” were not required and could have been removed had NSR provided CLC or New York Terminals, which was shown as the original consignee on many of the bills of lading, the opportunity to do so prior to placing them in storage, there is no reasonable basis to cling to the fiction that the asphalt, while in storage, constituted a hazardous material.

Finally, as CLC will demonstrate if the Board institutes a declaratory order proceeding, NSR, in all instances, diverted the tank cars for which additional storage is sought from the original destination, to NSR’s Oak Island yard, where they were placed in storage for varying periods of time. As the GATX study has shown, by the time that the cars were placed in storage on

NSR's track, the asphalt had cooled to a temperature that was lower than 212° F and no longer fit within the definition of a hazardous material.

Although NSR suggests that “it would be an incredible burden on interstate commerce (not to mention incredibly dangerous) if rail carriers needed to stop at various points in transit to test their hazardous loads, ensure that they remain hazardous, and to re-placard the cars in transit if the temperature falls to a certain range,”<sup>7</sup> no one is suggesting any need to test the material while in transit or to remove a placard or re-placard any car. As shown above, in the first instance, there is no need to placard cars used to transport asphalt if the cars reflect the Hot markings on both sides of the tank car. Most importantly, even if the “placard-like stencils” are inserted at origin, they can be removed at will at any point when the asphalt cools to less than 212° F. Furthermore, when tank cars are placed in dedicated asphalt service, the permanent stencils are not removed after the cars are unloaded, even if some residue remains in the tank cars. That, of course, is permitted by the exception at 49 C.F.R. § 172.502(b)(2), which plainly recognizes the well-known fact that “elevated temperature materials” will cool in transport to the point where the material being transported is no longer deemed to be hazardous. Hence, even if the offeror properly identifies the material as being a “UN 3257 Elevated Temperature Liquid N. O. S. (Asphalt) at the point of origin,” all concerned recognize, as shown by the GATX study, that by the time the

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<sup>7</sup> *Id.* at 13.

material has moved in transit for approximately three days, the offeror's designation no longer reflects the actual condition or status of the asphalt.

NSR's claim that it would be incredibly dangerous if it were required to test the material in transit is a specious, straw man argument that should not prevent the Board from exercising its primary jurisdiction at this time.

Because the unique issue involved here has never been previously considered by the Board or any court, declaratory relief would unquestionably terminate a major component of NSR's claim and remove uncertainty. Such relief is consistent with the concept and purpose of primary jurisdiction, which provides the Board with the ability to determine whether the practices of a rail carrier are unreasonable.

### **Conclusion**

For all the above-stated reasons, the Board should institute a declaratory order proceeding to resolve the unique issue presented by CLC's petition.

Respectfully submitted,

/s/ Richard H. Streeter

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Dated: July 6, 2016

Certificate of Service

I hereby certify that on this 6th day of July 2016, I caused a copy of Petitioner's Motion for Leave to File Response to Reply and Petitioner's Response to Reply to Petition for Declaratory Order to be served on the following party by first class mail, postage prepaid, or more expeditious method delivery:

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/s/ Richard H. Streeter  
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